

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST L. THOMAS,

Defendant-Appellant.

UNPUBLISHED

October 12, 2004

No. 248097

Wayne Circuit Court

LC No. 01-006101-01

Before: Griffin, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of 4 to 6 years imprisonment for his conviction of felonious assault, MCL 750.82, following a jury trial. Defendant was also convicted of possession of a firearm during the commission of a felony, MCL 750.227b, and was sentenced to two years in prison for that offense. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was originally charged with three counts of assault with intent to commit murder, MCL 750.83, one count of felonious assault, and four counts of felony-firearm, all arising out of an incident where he shot several bullets into a crowd outside a club. One witness saw defendant shoot a man and another saw him fire shots into the crowd. Larry Reed and Brandon Hicks were shot, but neither man could identify his shooter. Calem Brady testified that defendant pointed a gun at him and confirmed that defendant fired into the crowd. Police recovered fourteen spent shell casings from the scene, all of which were ejected from the same firearm.

The jury acquitted defendant of assault with intent to commit murder and felony-firearm involving Reed and Hicks, but convicted him of felonious assault and felony-firearm involving Brady.¹ At sentencing, the trial court rejected defendant's argument that Offense Variable (OV) 12, MCL 777.42, contemporaneous felonious criminal acts, should be scored at zero points rather than twenty-five points because he was acquitted of all charges related to Reed and Hicks.

¹ One count of assault with intent to commit murder and one count of felony-firearm were dismissed at the close of the prosecution's case.

The trial court determined that the statutory sentencing guidelines recommended a minimum sentencing range of 5 to 23 months for defendant's felonious assault conviction. The trial court did not sentence based on the guidelines, however, but found that defendant's subsequent conviction of first-degree murder, MCL 750.316,² his prior conviction for a different shooting death, and the fact that he could have killed several people in the club incident constituted substantial and compelling reasons for exceeding the guidelines. Therefore, the court sentenced defendant as a second habitual offender to 4 to 6 years.³

Defendant argues that he was acquitted of all charges related to the shootings of Reed and Hicks, so the trial court erred by scoring OV 12 at twenty-five points rather than zero. We disagree. In calculating the sentencing guidelines, the trial court has discretion to determine the number of points scored. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court's findings of fact at sentencing are reviewed for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

Although a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, including other criminal activities established even though the defendant was acquitted of the charges, and the effect of the crime on the victim. [*Compagnari, supra* (citations omitted).]

The trial court did not make an independent finding of guilt on the charges for which defendant was acquitted. Defendant was acquitted of specific intent crimes, so the jury could have based its acquittal on defendant's lack of intent to murder Reed and Hicks. The trial court's scoring of OV 12 did not constitute a finding that defendant possessed the specific intent to murder Reed and Hicks. It was enough for OV 12 that defendant assaulted them with a pistol, a felony violation of MCL 750.82, or shot them in violation of any number of other felony statutes. The prosecution presented strong evidence that defendant fired his weapon, and scientific evidence confirmed that only one firearm was shot during the episode. Therefore, the trial court did not clearly err by finding that defendant shot Reed and Hicks, correctly scored OV 12 based on that felonious behavior, and did not improperly supplant the jury's acquittal with an independent finding of guilt.

At sentencing, defendant failed to raise any objection to the scoring of OV 1, 3, or 9, so we will not review those scores on appeal as defendant requests. MCR 6.429(C); *People v*

² In *People v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 2004 (Docket No. 246796), another panel of this Court affirmed defendant's convictions of first-degree murder and felony-firearm.

³ The trial court's failure to advise defendant that he was entitled to appeal his sentence for felonious assault on the ground that the minimum term exceeded the guidelines was harmless error. MCR 6.425(E)(4); *People v Hicks*, 259 Mich App 518, 537; 675 NW2d 599 (2003).

McGuffey, 251 Mich App 155, 165; 649 NW2d 801 (2002). Furthermore, sufficient evidence supported the scoring of those variables, so counsel did not render ineffective assistance by failing to object at sentencing. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Next, defendant argues that the trial court abused its discretion by exceeding the recommended guidelines range for felonious assault, because the reasons articulated by the court as justifying a departure from the guidelines were taken into consideration in the calculation of the guidelines. We disagree. We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable de novo, and the determination that objective and verifiable factors merited the departure from the guidelines for abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). A trial court may depart from the guidelines based on a characteristic that was already considered in calculating the guidelines range if the trial court finds that it was given inadequate or disproportionate weight. MCL 769.34(3)(b).

Prior Record Variable (PRV) 7, MCL 777.57, regarding subsequent or current felony convictions, accounted for the fact that defendant had a subsequent felony conviction, but did not take into consideration that the conviction was for first-degree murder. PRV 1, MCL 777.51, prior high severity felony convictions, accounted for the fact that defendant had a prior conviction in which a death occurred, but did not account for the fact that he had a history of committing shooting offenses. Finally, OV 9 accounted for the fact that defendant's actions at the club resulted in multiple victims, but did not take into consideration the fact that defendant fired fourteen shots and could easily have killed several people. Therefore, while the guidelines superficially account for these circumstances, they do little to address the severity of this kind of offense or the grave history of this offender. Under these circumstances, the trial court correctly found that these factors were given inadequate weight in the calculation of the guidelines, MCL 769.34(3)(b), and did not abuse its discretion in finding that substantial and compelling reasons for exceeding the guidelines existed. *Babcock*, *supra* at 269.

Affirmed.

/s/ Richard Allen Griffin
/s/ Henry William Saad
/s/ Peter D. O'Connell